No. 94-400

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's conclusion that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from the union based on a decertification petition which petitioner's managers had actively solicited among the employees in the bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 22 F.3d 1114. The decision and order of the National Labor Relations Board (Pet. App. 19a-20a), including the decision of the administrative law judge (Pet. App. 21a-64a), is reported at 309 N.L.R.B. 869.

JURISDICTION

The original judgment of the court of appeals was entered on April 29, 1994. On August 2, 1994, the court entered a new judgment (Pet. App. 66a, 67a-69a), superseding its earlier judgment. On July 27, 1994, the Chief Justice extended the time for filing a petition for a

writ of certiorari to and including August 27, 1994. The petition for a writ of certiorari was filed on August 29, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to December 1989, Marriott In-Flite Services (MIFS) operated two facilities (Facility A and Facility B) near the Los Angeles International Airport and a third facility (Facility C) in Long Beach, California. Employees at the three facilities were represented by Local 572, International Brotherhood of Teamsters (the Union), which had been certified by the National Labor Relations Board (Board) as the employees' collective bargaining representative on September 4, 1988.[1] In December 1989, petitioner took over MIFS' operations at these facilities, recognized the Union, and honored MIFS' labor contract, which was effective June 1, 1989 through May 31, 1991. Pet. App. 2a-3a, 24a-25a.

By February 1991, petitioner employed a total of roughly 750 employees and 57 managers at the three facilities: 450 employees and 39 managers at Facility A, 275 employees and 14 managers at Facility B, and 25 employees and 4 managers at Facility C. As of that date, 403 employees (54% of the unit) had authorized petitioner to deduct union dues and fees from their paychecks, pursuant to the union security clause of the labor contract. Pet. App. 3a, 25a, 30a.

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[1] The Union represented a unit consisting of: all food and equipment handlers and helpers, chefs, dispatchers, coordinators, executive chefs, lead cooks, cooks, assistant cooks, lead bakers, bakers, lead station attendant, station attendant, kitchen supervisors, liquor room keeper, storekeepers, plant clerical, clerk dispatchers, maintenance employees, clerks, flight assemblers, auto maintenance employees, and bank attendants. Pet. App. 59a-60a.

2. On or about February 22, 1991, several employees prepared a decertification petition and solicited their co-workers to sign the petition at Facility A and Facility B over the course of the next seven days. Pet. App. 3a-4a, 25a. During the same period, petitioner's managers at Facility A and Facility B assisted this effort by actively soliciting employees' signatures on the petition, as follows:

a. On or about February 22, Jose Castillo, the transportation manager at Facility A, telephoned Luz Davalos at her desk in the accounting office to ask whether she had "signed the paper to get rid of the Union." When Davalos replied that she did not know what Castillo was talking about, Castillo stated that he would "send somebody else later to talk to" her. Thirty minutes later, Dolores Vasquez, a co-worker, visited Davalos at her desk, asked her to "sign the paper to get rid of the Union," and told her "not to be a dummy." Davalos refused to sign the petition. Castillo approached Davalos two hours later in the cafeteria and asked her whether someone had spoken to her about the petition. Davalos responded affirmatively and reiterated that she would not sign it. Davalos told three other employees about her encounter with Castillo; they reported that Vasquez had solicited them but they had refused to sign. Pet. App. 4a, 36a-37a, 50a.

b. On or about February 22, Alberto Pacheco, the production manager at Facility A, approached Rosa Rayas in her work area and asked whether she had signed the petition "to get the Union out." When Rayas replied that she had not, Pacheco warned her that, unless she did, the Union would charge her "more than $200" in back dues. Pacheco also told Rayas that the "Union was no good" because "the Union actually was a Mafia." Although Pacheco told Rayas that her signature was

necessary since "they only needed a few more signatures to finish the amount of signatures that the Government requires to get the Union out," she refused to sign the petition. Pet. App. 4a-5a, 39a-40a, 51a.

c. On February 21 or 22, Carlos Sosa observed Saul Monroy, the sanitation manager at Facility A, talking to employees in the dishwashing department about the petition. Monroy then approached Sosa and asked him to sign it so that employees could "obtain better salaries, [a] cheaper health program, and more days' [of paid] vacation." Sosa refused to sign the petition, which he noticed contained about nine signatures. Pet. App. 5a, 40a, 51a.

Between February 22 and 24, Monroy asked Jose Vasquez to "sign the list" in the dishwashing department at Facility A. When Vasquez asked what the list was for, Monroy responded "that he was taking the signatures so that the Union will stay *in*." Vasquez, whom petitioner knew to be a Union supporter, had been forewarned by fellow employees that Monroy would misrepresent the purpose of the list to trick him into signing it. Other employees told Vasquez that Monroy had solicited their signatures, and Vasquez noticed that there were ten to 15 signatures on the list. Vasquez, however, did not sign. Pet. App. 5a, 39a, 50a-51a.

On or about February 26, Monroy asked Alfred Mercado to sign a piece of paper in the dishwashing department at Facility A. Monroy refused to tell Mercado what the piece of paper was for, but Mercado assumed it was a decertification petition. Mercado also saw Monroy approach other employees, but he refused to sign. Pet. App. 5a, 40a, 51a. In late February, Monroy asked Victor Saldana, who worked in the dishroom at Facility A, whether he would "sign to be able to get the Union out." Saldana refused to sign and later told six or

seven co-workers about his encounter with Monroy. *Id.* at 6a, 41a, 51a.

d. Between February 22 and February 25, Monroy solicited groups of employees at Facility A. On February 22, Monroy spoke about the petition with a group of ten employees, three of whom signed it; later that day, Monroy spoke with a group of five employees, one of whom signed. Pet. App. 7a, 38a-39a, 51a. On February 23, Monroy spoke with a group of three or four employees in the cafeteria while holding the petition and offering them his pen. *Id.* at 7a, 37a, 51a. On February 25, Monroy asked a group of ten or 11 employees "to sign the paper to get the Union out," claiming that the Union was "stealing" from employees. The sheet of paper Monroy asked this group of employees to sign was already half filled with signatures. *Id.* at 7a, 41a, 51a.

e. On February 26, Oscar Peralta, the assistant manager at Facility B, handed Israel Lopez "a petition to get the Union out" and asked him to sign it in the presence of seven or eight other employees. Lopez refused to sign the sheet of paper Peralta offered him, which was already about three-fourths filled with signatures, explaining to Peralta that he was a shop steward. Lopez later saw Peralta soliciting Hector Hernandez, who refused to sign. Lopez told as many as 20 employees about his exchange with Peralta. Pet. App. 6a, 38a, 51a.

3. By March 4, 1991, 428 employees (57% of the unit) had signed the decertification petition, which several employees filed that day with the Board. On March 15, the Union requested petitioner to open negotiations for a new contract to succeed the existing agreement, which was due to expire on May 31. On March 20, petitioner informed the Union that it had a "good faith doubt" as to the Union's majority status in the unit, citing the

decertification petition as its basis for that belief, and refused the Union's request for negotiations. Pet. App. 7a, 25a.

To protest petitioner's refusal to bargain, several employees discussed the possibility of calling a strike. Pet. App. 7a. In early April 1991, Jose Ramirez, the general manager of Facility A, summoned Daniel Godoy into his office, accused Godoy of "agitating" the employees to launch a strike and told him that his actions were illegal and could result in his termination. *Id.* at 8a, 52a. On May 22, the employees voted 318 to 6 to go on strike. The 318 votes in favor of a strike represented 42% of the unit. *Id.* at 8a.

Petitioner then issued the following threats to employees: (1) in late May, human resources director Millie Bisono told Jerry Hayes that if he went out on strike, he would be fired; (2) on May 31, labor relations director Roberto Velazquez told Fulgencio Plascencia that petitioner "did not want the Union," that petitioner (in the ALJ's words) "intended to get the Union out any way it could," and that all employees who went out on strike would be "automatically fired"; (3) on June 1, Velazquez told Castulo Flores and a co-worker that striking employees would be "completely fired"; and (4) on June 3, transportation manager Jose Castillo told Willie Land that if she decided to strike she would no longer have a job. Pet. App. 8a, 53a-54a.

The strike commenced on June 3, 1991, and involved 289 employees (39% of the unit), including 61 employees who had signed the decertification petition. Petitioner continued operations by hiring replacement employees, and during the strike granted a wage increase of 4 to 6%. On October 3, the Union ended the strike unconditionally and demanded that petitioner immediately reinstate the strikers. Petitioner, however, refused to

do so, informing the Union that "[n]o current employee will be removed to make room for a striker." Pet. App. 8a-9a, 25a-26a, 49a.

4. On December 20, 1991, the Board's General Counsel issued a complaint against petitioner alleging that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5), by soliciting employees to sign the decertification petition and withdrawing recognition from the Union based on that petition. The General Counsel also alleged that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by refusing to reinstate the strikers at the end of the strike. Pet. App. 9a, 22a-23a.

After a hearing, the administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(1) by circulating and requesting employees to sign the decertification petition, as detailed above. Pet. App. 52a. Crediting the testimony of employees over that of the managers involved (*id.* at 50a-52a), the ALJ found that management's solicitation of employee signatures was "widespread and conspicuous." *Id.* at 55a. Taken in conjunction with Monroy's promise to Sosa of better wages and benefits if the Union were ousted and Pacheco's threat to Rayas respecting liability for back dues if the Union remained the employees' representative, the ALJ concluded that petitioner's acts of solicitation constituted unlawful conduct "of such a character as to cause employee disaffection, [having] an inherent tendency to contribute to the Union's loss of majority status." *Ibid.* "Solicitation under such circumstances," the ALJ explained, "interferes with employee freedom of choice, as the signatures obtained on the petition may not necessarily reflect the true desires of the employees and may therefore not be relied upon by

[petitioner] as a basis for withdrawing recognition." *Ibid.*

In so holding, the ALJ rejected petitioner's contention that its solicitation of employees was isolated and numerically insignificant in relation to the size of the unit. Pet. App. 55a. The ALJ explained that petitioner's managers solicited numerous employees in the presence of other employees; that "the employees who were approached related this fact to their co-workers"; and that, although some employees declined to sign the petition proffered by the managers, the petition sheets circulated by them showed that other employees had been constrained to sign. *Ibid.* The ALJ added that, given the "widespread and conspicuous" nature of the managers' solicitation efforts, and their accompanying threats and promises, it was reasonable to assume that those employees who signed the petition at the behest of their co-workers were aware of, and likely unfairly influenced by, the managers' unlawful conduct. *Ibid.*

Accordingly, the ALJ concluded that petitioner violated Section 8(a)(5) by relying on the "tainted" decertification petition as the basis for withdrawing recognition from the Union, and by granting the wage increase during the strike without bargaining with the Union. Pet. App. 55a-56a. The ALJ also concluded that the statements made by Monroy and Pacheco to Sosa and Rayas in connection with the solicitation of their signatures, and management's threats to fire employees who encouraged or participated in the strike, constituted independent violations of Section 8(a)(1). Pet. App. 52a-54a. And, because the strike had been called "in large part[] in protest of [petitioner's having] express[ed] a good faith doubt of the Union's majority status, and refusal to bargain for a new agreement," the ALJ found that petitioner violated Section 8(a)(3) by refusing to

reinstate the strikers to their former jobs at the conclusion of the strike. Pet. App. 56a-57a.

To remedy its unfair labor practices, the ALJ ordered petitioner, among other things, to cease and desist from refusing to bargain with the Union and to reinstate the strikers with backpay. In addition, the ALJ ordered petitioner to bargain upon request with the Union. Pet. App. 59a.

The Board affirmed the ALJ's findings and conclusions, and, with a minor modification not relevant here, adopted his remedial order. Pet. App. 19a-20a.[2]

5. The court of appeals enforced the Board's order in part. Pet. App. 1a-18a. The court, in agreement with the Board, found that substantial evidence made the conclusion "virtually inescapable" that "[petitioner's] management solicited a considerable number of signatures." *Id.* at 12a-13a. The court noted, in particular, that 61 employees who signed the decertification petition participated in the strike, and, were their signatures discounted, the petition would not have been supported by a majority of the employees. *Id.* at 14a. The court also agreed with the Board that "employees who signed the petition at the behest of other employees were undoubtedly aware of management's obvious efforts to engineer the decertification." *Id.* at 13a. In short, the court found "no cause to quibble with the ALJ's conclusion, adopted by the Board, that signing employees

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[2] Petitioner did not challenge, either before the Board or in the court of appeals, the ALJ's determination that petitioner violated Section 8(a)(1) by threatening to discharge employees who encouraged or participated in the strike. Petitioner does not contest that finding here. Further, petitioner did not challenge in the court of appeals, and does not contest here, the ALJ's conclusion that Monroy's and Pacheco's remarks to solicitees Sosa and Rayas violated Section 8(a)(1).

were influenced by pervasive management efforts to procure signatures." *Ibid.* The court upheld the Board's remedial order, except for the affirmative requirement that petitioner bargain with the Union. Because that provision would bar the employees from decertifying the Union for a reasonable period of time, the court remanded the case to the Board for "[an] explanation as to why, in the particular circumstances, the extra protection against decertification was necessary." *Id.* at 17a-18a.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the National Labor Relations Board's decisions have rendered "illusory" in practice the "good faith doubt" defense accorded an employer who withdraws recognition from an incumbent union believing the union to lack majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (after certification year, employer may withdraw recognition from incumbent union "either by showing that the union in fact lacks majority support or by demonstrating a sufficient objective basis for doubting the union's majority status"). That issue is simply not presented by the instant case. It was not raised in, or addressed by, the court of appeals. Rather, in the court of appeals, petitioner argued unsuccessfully that there was not substantial evidence that its conduct had tainted the union decertification petition. Pet. C.A. Br. 18-23. Petitioner presents no basis for deviating from this Court's "normal policy" of not considering issues presented in the first instance to this Court. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967).

In any event, the issue framed by petitioner is not presented by the facts of this case. Petitioner condemns

(Pet. 7) the Board for "regularly reject[ing] circumstantial evidence of the union's lack of employee support as insufficient," and instead requiring the employer to prove that the union has in fact lost majority status.[3] Petitioner claims (Pet. 7-8) that that burden is unattainable in practice because it can only be achieved by polling the employees, which employers are effectively prevented from doing absent a good faith doubt as to the union's majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989) (employer must have a reasonable doubt as to the incumbent union's continued majority status in order to poll employees, petition the Board for an election, or withdraw recognition from the union), modified on other grounds, 923 F.2d 398 (5th Cir. 1991).[4] But this case does not involve an employer prevented by the *Texas Petrochemicals* rule from polling employees to confirm other evidence indicating that the union no longer enjoys majority support, or a rejection by the Board of untainted circumstantial evidence of a union's loss of support.

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[3] See *Curtin Matheson*, 494 U.S. at 788 n.8 ("To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union.").

[4] In thus framing the question presented, petitioner echoes the concerns raised by the Chief Justice and Justice Blackmun in their separate opinions in *Curtin Matheson*. See 494 U.S. at 797 (Rehnquist, C.J., concurring) (questioning "whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments"); *id.* at 799 n.3 (dissenting opinion of Blackmun, J.).

On the contrary, the evidence credited by the Board and the court of appeals was that petitioner knew in February 1991 that 403 employees (a 54% *majority* of the bargaining unit) had authorized it to deduct Union dues and fees from their paychecks. Pet. App. 3a, 30a. Notwithstanding its knowledge of the union's majority support, petitioner less than a month later launched a "widespread and conspicuous" (*id.* at 55a) campaign to induce employees to sign a decertification petition that had been sponsored by approximately 13 employees (less than 2% of the bargaining unit). As the Board found, petitioner then relied upon the tainted petition to justify withdrawing recognition from their bargaining representative. Far from petitioner's having a legitimate circumstantial basis for doubting the Union's majority support, the actions of petitioner's employees demonstrated the contrary. Notwithstanding petitioner's threats to discharge employees if they protested its action by striking, 61 of the employees who originally signed the petition participated in the ensuing strike—a number that, if subtracted from the total number of signatories on the tainted decertification petition, deprived that petition of the signatures of a majority of employees. *Id.* at 4a-8a, 14a, 50a-54a. Under these circumstances, as the Board and the court of appeals found, petitioner's conduct, far from representing good faith reliance on circumstantial proof of employee disaffection with their union, was a blatant violation of Section 8(a)(5) of the Act under established precedent.[5]

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[5] "[A]n employer that has itself orchestrated the union-ousting campaign" by promoting a decertification petition "cannot rely on the pendency of [that] petition or the [union's] loss of majority status to justify its withdrawal of recognition of, and refusal to bargain with the incumbent representative." *NLRB* v. *Maywood*

2. Petitioner also contends (Pet. 8-9) that the Board fails to follow a neutral policy respecting the holding of elections. Petitioner asserts that it is wrong for the Board not to conduct a decertification election where the decertification petition has been unlawfully solicited by the employer, but to conduct a representation election where the union has violated the parallel rule of *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270, 277 (1973) (union's offer to waive initiation fees for those employees who signed a pre-election "recognition slip" interferes with employee free choice in the election). This claim was also neither raised below nor addressed by the court of appeals.

Petitioner's criticism is also mistaken. In *Gaylord Bag Co.*, 313 N.L.R.B. 306 (1993), the Board found that some of the union authorization cards submitted to satisfy the showing of interest requirement for obtaining a Board election[6] had been secured through a fee waiver offer in violation of *Savair*. The Board held that this violation justified setting aside the election (which the union had won). At the same time, the Board rejected the employer's claim that the *Savair* violation also required the more severe sanction that the representation petition be dismissed. Instead, it directed that a new election be held. Petitioner contends (Pet. 9)

Plant of Grede Plastics, 628 F.2d 1, 5 (D.C. Cir. 1980). Accord *Microimage Display Div. of Xidex Corp.* v. *NLRB*, 924 F.2d 245, 253-254 (D.C. Cir. 1991); *NLRB* v. *Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972).

[6] Before proceeding to an election on a union petition, the Board requires a showing that "the petitioner has been designated by at least 30 percent of the employees." 29 C.F.R. 101.18(a). The purpose of a showing of interest is to determine whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. See *NLRB* v. *J.I. Case Co.*, 201 F.2d 597 (9th Cir. 1953).

that because the union violations in *Gaylord* did not merit the penalty of dismissal of the petition, its unlawful solicitation should not "result in dismissal of the decertification petition, thereby depriving employees of even one opportunity to vote a union *out*."

Petitioner's analogy fails, for two reasons. First, in *Gaylord*, the Board found sufficient employee interest in union representation to warrant a new election notwithstanding the union's misconduct, see 313 N.L.R.B. at 307, whereas here, the evidence found by the Board belies the claim that sufficient untainted employee disaffection with the Union existed to justify the conduct of a decertification election. Second, the issue before the Board in this case was not, as in *Gaylord*, the purely administrative one of whether to conduct an election or to dismiss the petition. Here, the employer not only tainted the petition, but made impossible the holding of a fair election by unlawfully withdrawing recognition from and refusing to bargain with the Union. Such misconduct must be remedied before a fair election can be held, typically through the issuance of an order requiring the employer to cease and desist from refusing to bargain with the union and to post a notice agreeing to that condition, and a separate order requiring the employer to bargain, upon request, with the union.[7] The

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[7] See, *e.g.*, *Ron Tirapelli Ford, Inc.* v. *NLRB*, 987 F.2d 433, 445 (7th Cir. 1993); *NLRB* v. *Hollaender Mfg. Co.*, 942 F.2d 321, 327-328 (6th Cir. 1991), cert. denied, 112 S. Ct. 1168 (1992); *Louisiana-Pacific Corp.* v. *NLRB*, 858 F.2d 576, 578-579 (9th Cir. 1988); *Alexander Linn Hospital Ass'n*, 288 N.L.R.B. 103, 111 (1988), enforced *sub nom. NLRB* v. *Wallkill Valley General Hosp.*, 866 F.2d 632, 636-638 & n.3 (3d Cir. 1989); *NLRB* v. *A.W. Thompson, Inc.*, 449 F.2d 1333, 1336-1337 (5th Cir. 1971), cert. denied, 405 U.S. 1065 (1972). See also *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944).

Board in this case issued both such orders. But, with the court of appeals having remanded the latter order for further explanation, petitioner in fact has thus far fared better in the court of appeals below than it might have in other circuits.

3. Petitioner's final claim (Pet. 10-14) is that the court of appeals erred in holding that substantial evidence supported the Board's finding that it engaged in widespread unlawful solicitation of the decertification petition. That fact-bound claim does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, the Board's finding, affirmed by the court of appeals, was amply supported by evidence (1) that petitioner's managers solicited numerous employees on an individual basis, often in the presence of other employees; (2) that employees so solicited told co-workers about their confrontations with management; (3) that manager Monroy solicited entire groups of employees, some of whom signed the petition; (4) that employee signatures in fact appeared on the petitions which the managers circulated; and (5) that employees who signed the petition at the behest of co-workers were undoubtedly aware of, and were likely influenced by, the managers' solicitation efforts. In these circumstances, the court of appeals correctly found "virtually inescapable" the conclusion that "[petitioner's] management solicited a considerable number of signatures." Pet. App. 12a-13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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